

# The Gazette of India



EXTRAORDINARY

PART II—Section 3

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No. 181 NEW DELHI, THURSDAY, AUGUST 26, 1954

ELECTION COMMISSION, INDIA

NOTIFICATION

*New Delhi, the 3rd August 1954*

**S.R.O. 2820.**—Whereas the election of Shri Vrindawan Prasad Tiwari, as a member of the Legislative Assembly of the State of Madhya Bharat, from the Guna constituency of that Assembly, has been called in question by an Election Petition duly presented under Part VI of the Representation of the People Act, 1951 (XLIII of 1951), by Shri Sita Ram, son of Vishwanath, caste Brahmin, Guna c/o Dr. Tatke's Bada, Guna, Madhya Bharat;

And whereas, the Election Tribunal appointed by the Election Commission, in pursuance of the provisions of Section 86 of the said Act, for the trial of the said Election Petition has, in pursuance of the provisions contained in section 103 of the said Act, sent a copy of its Order to the Commission;

Now, therefore, in pursuance of the provisions Section 106 of the said Act, the Election Commission hereby publishes the said Order of the Tribunal.

BEFORE THE ELECTION TRIBUNAL, GWALIOR, MADHYA BHARAT

ELECTION PETITION No. 21 OF 1953

Election Petition under Section 80 of the Representation of the People Act 1951 in respect of Madhya Bharat—Legislative Assembly seat—Guna Constituency No. 58.

CORAM:—

Shri Suraj Bhan, B.A., LL.B., Chairman.

Shri S. M. Pagnis, M.A., LL.B., Member.

Shri S. K. Gokhle, Advocate, Member.

Sitaram son of Vishwanath by caste Brahmin, resident of Guna C/o Dr. Tatke's Bada, Guna, Madhya Bharat—*Petitioner.*

*Versus*

1. Vrindawan Prasad Tiwari, son of Devaki Nandan, Devaki Bhawan, Guna, Madhya Bharat. (Returned Candidate).
2. Raja Ram, son of Vishwanath by caste Brahmin, Resident Guna C/o Dr. Tatke's Bada, Guna.
3. Pannalal Jain by caste Jain, resident Guna C/o Hiralal Pannalal, Main Bazar, Guna.
4. Sagar Singh Sesodia, Contractor caste Rajput, resident Guna.
5. Nathulal Mantri, Forest Contractor, Guna.
6. Brijnarayan Brijesh by caste Brahmin resident of Isagarh Pargana Pachhar, District Guna—*Respondents.*

Mr. G. P. Patankar and Mr. V. K. Sapre, Counsel for the Petitioner.  
Mr. P. L. Inamdar, Mr. A. B. Mishra and Kailash Chandra, Counsel for the Respondents.

### JUDGMENT

This petition arose out of the election of a member in the bye election to the Madhya Bharat Legislative Assembly from the Guna Constituency. In this case there were in all seven nominated candidates. The petition is filed by a defeated candidate Shri Sitaram Talke the only candidate who contested the election against respondent No. 1 Shri Vrindawan Prasad Tiwari a returned candidate from the above said constituency. The petitioner claims that the election of Respondent No. 1 is void and is liable to be set aside as he is guilty of various major corrupt practices detailed in the petition, such as undue influence, publication of false statement, and obtaining the assistance of persons who were serving under the Government of Madhya Bharat, for the furtherance of the prospects of his election as specified in section 123 of sub-clauses (2)(5) and (8) of R.P. Act. It is further alleged that respondent No. 1 has not shown all correct items of expenditure. The petitioner has further prayed that he be declared to have been duly elected.

The main grounds on which the petitioner has challenged the election briefly stated are:—

(i) That Kanwarji, son of Pyare Lal, resident of village Karod Pargana, District Guna, was a Patel of village Mangwar at the date of Polling, i.e. on 12th July 1953, and he was appointed by Respondent No. 1 as his Polling Agent at the Polling Station Karod and he did work as such on the date of election and thus his assistance was obtained and procured for the furtherance of the prospects of election of Respondent No. 1.

(ii) That Kundan Lal son of Ganga Prasad of Colony Rampur, acted as a Polling Agent of respondent No. 1 at this Polling Station on 12th July 1953 when he was Kanji House Rakshak in Colony Rampur and a Secretary of the Gram Panchayat of the above said village.

(iii) That Hari Shankar son of Jagannath Prasad who is a relation of Respondent No. 1 and who was a Patel of village Khuja in Guna District worked for respondent No. 1 on 19th July 1953 i.e. on the date of the Polling at Telli Kheda Polling station.

(iv) That the above mentioned Hari Shankar with his brother Kripa Shankar attacked with arms Shri Prem Narain Advocate, a worker of the petitioner, with the purpose of assisting respondent No. 1 and furthering his prospects of election.

(v) That respondent No. 1 and respondent No. 6 delivered speeches wherein they threatened the Muslim voters of dire consequences in case they do not vote for the Mahasabha candidate. It is, therefore, alleged that both of them interfered with the free exercise of the electoral right of the Muslim voters.

(vi) That a pamphlet was published by Mantri Hindu Mahasabha Guna which contained a false statement of fact, pertaining to the personal character and conduct of the petitioner which respondent No. 1 believed to be false or did not believe to be true.

In the written statement respondent No. 1 denied all the allegations of undue influence, publication of false statement, falsity in the return of Election expenses etc. contained in the petition. He further says that nothing was done as alleged within the knowledge of respondent No. 1 or with his connivance either by himself or by his agent or anybody on his behalf or his agent.

All the other respondents from 2 to 6 did not put in appearance and Ex-parte proceedings were taken against them. In the case continued in their absence.

The pleadings gave rise to the following issues:—

1. Did respondent No. 1 appoint Kunwarji, son of Shri Pyarelal, his Polling agent at the Polling Station Karod on 12th July 1953 when he was a Patel and as such was he working under the State of Madhya Bharat. If so what is its effect?

2. (a) Did respondent No. 1 appoint Kundan Lal, son of Gya Prasad, as his Polling Agent on 12th July 1953 on Polling Station Colony Rampur for the furtherance of the prospects of his election?

(b) Are the Offices of Kanji House Rakshak and Secretary Gram Panchayat, Offices of profits under the Government of the State of Madhya Bharat, for the purpose of R. P. Act 1951 and if so what is its effect?

3. Did Hari Shankar Patel work on 19th July 1953 at Polling Station Tilli Khedi for the furtherance of the prospects of the election of respondent No. 1 and if so what is its effect?

4. Whether Mr. Hari Shankar and Kripa Shankar attacked Prem Narayan with arms with a view to obstruct the Election work of the petitioner and was this assistance procured by or with the connivance of respondent No. 1?

5. Whether respondent No. 1 and Brij Narayan Brijesh threatened the Muslims voters as stated in the para. No. 7(ii) and does this amount to interference with the free electoral right of Muslim voters and was all this done with the connivance of respondent No. 1?

6. Are the allegations contained in para. 7(ii)a indefinite and vague and thus require to be struck off.

7. (a) Does the pamphlet mentioned in para. No. 7(iii) of the petition contain a false statement of facts which was believed to be false and was not believed to be true by the respondent No. 1 and does it pertain to the personal conduct of the petitioner or his candidature and if so with what effect?

(b) Were copies of these pamphlet mentioned in para. 7(iii) of the petitioner distributed by Balkishan Panwala, a worker and agent of respondent No. 1 and what is its effects?

8. Has respondent No. 1 not shown correct items of the expenditure as per para. 8 of the Election Petition, and if so with what effect?

9. Is respondent No. 5 entitled to any costs from the petitioner?

10. To what relief is the petitioner entitled?

*Issue No. 1.*—This issue is framed on the allegation of the petitioner raised in para. No. 7(i)(a) of the petition and list of particulars supplied with it. This issue as it is framed requires three questions to be determined firstly did respondent No. 1 appoint Kanwarjee S/o Pyarelal as his Polling agent on 12th July 1953, secondly was he a Patel on this date and thirdly, whether a Patel appointed under the Rules in vogue in Madhya Bharat State, can he be considered to be working under the State of Madhya Bharat. Respondent No. 1 has denied the appointment of the abovementioned Kanwarjee as his Polling Agent for the purpose of bye election on 12-7-53 and further said that Kanwarjee S/o Pyarelal did not act as his Polling Agent on the polling station of Karod when the voting took place. Respondent No. 1 has also denied that he, in any way, obtained and procured the assistance of Kanwarjee for the furtherance of his election prospects, Respondent No. 1, however, had not denied this fact that Kanwarjee S/o Pyarelal was patel of village Karod at the time of the bye election. Respondent No. 1 has set up an alternative story in the evidence on record that he appointed Kanwarjee S/o Kaluram of Dhamnor as his polling agent for Karod Polling Station and he did not attend on that day when bye election took i.e. 12-7-53. It is to be remembered that respondent No.1 did not mention this fact of mis-identity in his written statement on which the learned counsel for the petitioner has laid great stress and argued this point very vehemently, before us which we will discuss later on at the proper stage.

As has been said above that this fact that Kanwarjee S/o Pyarelal was a Patel on the date when bye election took place at Karod is admitted by respondent No. 1. It has not been disputed before us that Patel is not a person serving under the Government of Madhya Bharat. It will suffice for us to mention that the source from which a person draws his salary is one of the tests for determining whether he is a Government servant or not. A further test is by whom he is liable to be dismissed. Taking in view the provision of Section 123 clause 8 Explanation (b) of R. P. Act 1951 with section 133 to 138 of Madhya Bharat Revenue Administration and Ryotwari Land Revenue and Tenancy Act Samvat 2007 and the rules made thereunder and other relevant law on the subject under discussion we hold for the purpose of this case that Patel is a person who is serving under the Government of Madhya Bharat. We are clear in our mind on this point and moreover it has not been disputed by the learned counsel for respondent No. 1 and so it needs no authority to support this proposition of law.

Now the important point which goes to the root of this issue and requires determination is, whether Kanwarjee, S/o Pyarelal, acted as Polling Agent on 12-7-53 at Karod Polling Station and whether he was appointed as such by respondent No. 1 or whether an assistance of this kind was obtained or procured by Respondent No. 1 or his agent or by any person with the connivance of a candidate or his agent for the furtherance of the prospects of respondent No. 1.

Petitioner has produced in support of his issue Narain Singh P.W. 1, Hiralal P.W. 8, Kanwarjee P.W. 3 S/o Pyarelal, Onkar Singh P.W. 4 Babulal Patwari P.W. 5, Shri M. S. Tomar Presiding Officer, P.W. 8 and Shri Badri Prasad P.W. 9 the Polling Officer, Respondent No. 1 has himself come in the witness box to controvert this point and produced in addition Narayan Singh R.W. 2, Bhawarlal R.W. 3, Kanwarjee S/o Kaluram R.W. 4 and Hari Singh R.W. 7.

Before we deal with the evidence, it is important to mention here that though the clerk concerned brought the concerning record of Polling Station, Karod and Colony Rampur yet the appointment letters in the prescribed form signed by the Candidates or his election agent as required by Rule 12 of the Representation of People (Conduct of Elections and Election Petitions) Rules 1951, regarding appointment of Polling agents are missing. A report to this effect is taken from the clerk concerned on an application filed by the petitioner. This report is dated 18th February 1954 and is on record. Of these rules (Rule 51, 107, 108 and 109 are worth mentioning. They deal with custody, return, production, inspection and disposal of Election papers. The general duty of the Returning Officer is to do all such acts and things as may be necessary for effectually conducting the Election in the manner provided by Law. He is the person mainly responsible for the conduct of the actual election. His duties are numerous and out of these some are mentioned above as provided in rules given above. We take a very serious view of the fact that the forms of appointment are missing from the record and it needs no emphasis that the proper custody of this record must be maintained. The presence of the forms of appointment of Polling agents would have greatly helped us to decide this issue one way or the other. It is for the Government to take whatever steps it thought proper in this connection that things of this kind may not occur again.

(1) Mr. Inamdar, the learned counsel for respondent No. 1 has argued before us that the forms for the appointment of Kanwarjee Patel as well as Kudanlal Khidak Rakshak have not been produced. He has further contended that it has not been formally proved that they have been lost or destroyed therefore the petitioner could not be allowed to lead the secondary evidence. Mr. Patankar, the learned counsel for the petitioner in reply has said that the petitioner has called for the clerk concerned with relevant papers and forms concerned were found missing from the record as is clear from the report dated 18-2-54 of the clerk concerned so no duty was cast upon the petitioner under the circumstances to prove the loss of the forms. We agree with the argument of the learned counsel for the petitioner. Sec. 64 of Indian Evidence Act wish enjoins that documents must be proved by "Primary Evidence" except in the cases hereinafter mentioned. So as writing is the best evidence of its own contents and must be introduced unless it has been lost or destroyed or its absence is otherwise satisfactorily accounted for. The reasons are simple and obvious enough as dictated by common sense and long experience. The rule is that the best evidence must be produced that can be had. First the original if that cannot be had, the party be allowed to prove it any way and by any circumstances the nature of the case will admit. But for this the law requires a proper foundation to be laid and two things are necessary. First to prove that such a deed once existed. The next step is to show some ground that the deed is lost or being in adversary's hands and cannot be had. Sec. 46 of the R.P. Act 1951 deals with appointment of Polling agents. Rule 12 para. 3 of the Representation of the People (Conduct of Elections and Election Petitions) Rules 1951 enjoins on the polling agent to present on the date fixed for the poll the duplicate copy of the letter of appointment and sign the declaration contained therein before the Presiding Officer of the polling station or the Returning Officer, presiding over the place fixed under sub-section (i) of section 29 for the poll. Where such Polling Agent is appointed for duty and the Presiding Officer or the Returning Officer as the case may be, shall thereafter retain it in custody and no Polling agent shall be allowed to perform any duty at the polling station or the place fixed for the poll unless he has complied with the provision of this sub-rule. So it is clear that if any Polling Agent was appointed by Shri Tiwari Respondent No. 1 for Polling Station, Karod the form must exist. Shree Tomar P.W. 8 also testifies that he did see the forms. So the next question which arises is whether the petitioner has satisfactorily shown the loss or destruction of a writing which opens the door for the admission of secondary evidence as to its contents. The petitioner summoned the clerk concerned with the relevant record. The forms

were not available. The report to this effect dated 18th February 1954 is there on the application of the petitioner. The petitioner has done what was possible for him under the circumstances. The question is always one of due diligence in the effort to procure the original before evidence of its contents is recorded. Under the circumstance when the custody of the forms was with the returning Officer concerned it was not for the petitioner to prove as to how and under what circumstances the loss occurred. We are of opinion that the petitioner made bonafide efforts to bring the original forms on record and failing which he could lead secondary evidence. The arguments of Mr. Inamdar though correct on principle do not apply to the fact of the case.

Having decided that Mr. Patankar could lead secondary evidence we have to decide now whether the petitioner has proved this issue. In deciding this we have also to consider the standard of proof required for proving a corrupt practice. This aspect of the case is very important as it depends on this factor whether a case of the petitioner is proved or not. We have very carefully considered and we are of opinion that issue No. 1 is that of Criminal Nature, the evidence must be of the same standard as would be required in a Criminal case. So it is clear that the standard of proof required in the matter of a corrupt practice is the same as that in the case of criminal charge. Suspicion however strong cannot take the place of Proof, we are fortified in our view by a case of Hoshiarpur west General Constituency case No. 1 reported in the Indian Election Case 1935 to 1950 by H. S. Doabia and by Jaipur Election case No. 281 of 1952 published in the Government of India Gazette Extraordinary, dated 19th February 1954 on page 209. Now having taken this point of view as stated above we like to discuss the evidence of the parties.

Narain Singh P.W. 1 has deposed that Kanwarji S/o Pyarelal was a Polling Agent of Shri Tiwari respondent No. 1. We went to vote on the day when the polling took place and he saw Kanwarji and Hiralal and Polling Agent of Shri Tatke sitting on Khat just 15 feet away from the place where votes were being given. This witness admits in his cross-examination that he simply saw Kanwarjee sitting. He does not know when Kanwarjee reached there. He did not see him talking to any of the voters. P.W. 1 has not stated as to how and on what grounds he came to consider him as a Polling Agent of respondent No. 1. So this witness does not help us to decide this issue.

Hiralal P.W. 2 who was a polling agent of the petitioner stated that Kanwarji Patel was the polling agent of Hindu Maha Sabha. He admits in the cross-examination that Kanwarji did not do any work but he kept sitting like him. This witness although he was a polling agent does not go further and say that the appointment forms were there and the Presiding Officer got those forms attested or any thing of the kind to show that Kanwarji acted as a polling agent of Respondent No. 1. This witness too being a polling Agent of Respondent No. 1 hitches his wagon with the cause of his master and does not go any further and cannot be relied on.

P.W. 3 Kanwarji Patel himself has deposed that Shree Tiwari asked him to work on his behalf about 10 or 15 days before the voting took place and he similarly sat on 12th July 1953 at the Polling Station. This witness does not go further and is not helpful to the petitioner. He does not say that he filled the form and delivered a duplicate copy of the letter of appointment to the Presiding Officer or the Polling Officer as the case may be provided by the Rule 12 of the Representation of the People Act (Conduct of Elections and Election Petitions) Rules 1951. He admits that there was no other Polling Agent from Hindu Maha Sabha on that day. Kanwarji himself does not say that he sat inside the polling station as would have been possible vide rules 17 of the rule framed under R. P. Act as he being the only person present on that day from Hindu Maha Sabha. He even does not say that he did any work. Furthermore Narain Singh P.W. 1 got an affidavit filed from Kanwarji before collector Guna regarding the statement which he was to give here, with a view that he may not tell a lie here before us is worthy of note and no explanation is offered before us as to why it was done. No reliance, therefore can be placed on this witness for the statement that he gave before us though he could have been a very important witness to prove the fact of his appointment as a Polling Agent of respondent No. 1 P.W. Onkarshingh simply stated that he identified Kanwarji Kanwarji himself and does not state this fact and moreover this alone does not prove Kanwarjee's appointment as Polling Agent of respondent No. 1.

Babulal P.W. 5 has also deposed that he also identified Kanwarji Patel and he further says that the Presiding Officer showed him the form which is required for the appointment of a polling agent. He admits that Kanwarji Patel did not sign before him. No explanation has been offered as to why the polling officer

showed him the only one form of Kanwarji. This witness does not say that the attestation was done before him which should have been done before him in the normal course when he was present there at the time of identification. Shri Tomar P.W.8 did not confirm this fact that he showed the form of appointment of Kanwarji Patel as Polling agent to this witness. We attach no credence to a witness of this type.

Now remains the evidence of Shri Tomar P.W. 8 and Badri Prasad P.W. 9 on whose evidence Shri Patankar has laid much stress. Shri P.W. 8 has deposed that Ex-P 5 bears his signatures. It is a proceeding dated 12-7-53 of the polling Station Karod of which he was the Presiding Officer. He further states that he received four forms regarding the appointment of polling agents and got them verified and then allowed the polling agents to sit in the booth. He explained that he got the verification in such a way that he compared the signatures of the polling agents by asking them to sign in his presence and further got them identified by the Patel and the Patwari. Kanwarji Patel was shown to the witness and he was asked a question whether that person acted as a polling agent on the booth. This simple question was explained to the witness at length but he showed hesitation in reply. A note to this effect is made on his deposition. The reply what Shri Tomar gave after so much hesitation is not clear. First he said whether Kanwarji Patel shown to him acted as a polling agent or not, he did not pay any attention to this and afterwards he said that the aforesaid Kanwarji was present there. It is rather strange that a man of his position and status who deposed that he got the signature compared and identification done should come forward and say that he did not care to know whether the person shown to him acted as a polling agent or not. In the cross-examination he further stated that the abovesaid Kanwarji acted as a polling agent. Shri Tomar is not in a position to tell the parentage of Kanwarji. Badri Prasad P.W. 9 corroborates this fact that Kanwarji Patel did act as a polling agent. P.W. 9 Badri Prasad was a polling Officer on the polling station on 12-7-53. Shri Tiwari Respondent No. 1 has appeared as his own witness and has denied the appointment of Kanwarji as his polling agent and has further said that he appointed one Kanwarji son of Kaluram of Dhamnor as his polling agent. He has also deposed that he got the polling agents forms also signed by him. Narayan Singh R.W. 2 and Bhanwar Lal R.W. 3 corroborate this fact that Kanwarji of Dhamnor was appointed by Shri Tiwari as his polling agent and two forms were filled and duly signed. Kanwarji of Dhamnor R.W. 4 has also come as a witness. He too corroborates this fact. It has been admitted by Respondent No. 1 that Kanwarji of Dhamnor whom he alleges to appoint his polling agent did not attend Karod polling station on the date when polling took place i.e. on 12-7-53. Respondent No. 1 himself admits that there was a list containing the names of his polling agents in his office, but that list has not been produced. The duplicate copy of letter of his appointment of a polling agent is not produced and neither it is said that it is lost. It has also come in evidence that one Kanwarji son of Pyarlal was the only person of that name who was present at the polling station Karod on the date when polling took place i.e. on 12th July 1953. This fact has not been denied by the respondent No. 1 in any way. So considering the whole of evidence on record concerning this issue and weighing the cumulative effect, we come to the conclusion that Kanwarji son of Pyare Lal did act as a polling agent but it is not proved by any evidence whatsoever, that Respondent No. 1 appointed him as his polling agent which goes to the root of the issue. Shree Patankar, learned Counsel for the petitioner has argued before us that Respondent No. 1 did not produce the list of the polling agents which he admits that it was once in his office and moreover having in his possession the documentary evidence of the forms filled by Kanwarji son of Kaluram whereby he could dislodge the petitioner and failing to produce it should be presumed against Respondent No. 1 and the petitioner's case be taken as proved. Shree Patankar has brought our attention to section 106 of the Indian Evidence Act and cited A.I.R. 1948 Calcutta 88; A.I.R. 1935 Bombay 443, A.I.R. 1917 P.C. 6; A.I.R. 1934 P.C. 217 and A.I.R. 1940 Oudh 35 in support of his contention. Section 106 of the Evidence Act says that when any fact is especially within the knowledge of any person the burden of proving that fact is upon him. This section enacted the second exception to the general rule that the burden of proof is on a party who substantially asserts the affirmative of any issue. It is a general rule of evidence that burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his own knowledge or of which he is supposed to be cognizant. The rule is of a very general application. It holds good whether the proof of the issue involves the proof of affirmative or of a negative and has even been allowed to prevail against the presumptions of law. The application of the rule enacted by section 106 of the Evidence Act to

criminal cases is often of considerable difficulty. The rule contemplates facts which in their nature are such as to be within the knowledge of the accused and of nobody else. It has no application to cases where the fact in question having regard to its nature is such as to be capable of being known not only to the accused but also by others. In this particular case the fact of the appointment of the polling agents at particular station is not a fact which is within the exclusive knowledge of Respondent No. 1. If a notice of appointment of a polling agent is required to be sent to the Returning Officer, a duplicate copy of his appointment letter is required to be filled with the Presiding Officer of the polling station and then that polling agent is to act in the presence of other agents, if there are any. So considering the facts to be proved under this issue section 106 of the Evidence Act has no application. All other authorities cited by Mr. Patankar are distinguishable and are of general application and do not apply particularly to this case. It is not necessary to discuss these authorities and in our opinion the petitioner has failed to discharge the burden which was on him to prove this issue and hence we decide this issue against the petitioner.

**Issue No. 2.**—This issue consists of two parts. In the first part we have to decide whether Respondent No. 1 appointed Kundan Lal, son of Gya Prasad, as his polling agent for Colony Rampur and if so did he work there in that capacity. In the second part two questions require determination. Firstly, whether the above mentioned Kundan Lal was Kanji House Rakshak and Secretary, Gram Panchayat. If the answer is in the affirmative then the next question which arises is whether as such does he hold an office of profit under the Government of State of Madhya Bharat for the purposes of R. P. Act, 1951 and whether can he be considered to be a person serving under the State of Madhya Bharat.

Shri Tiwari in his written statement para. 1(7)(b) denied the appointment of Kundan Lal Khirak Rakshak as his polling agent for polling station Colony Rampur. He has further denied that the said Kundan Lal worked as his polling agent on 12th July 1953 on the polling station mentioned above. This fact, however, is admitted by him that Kundan Lal son of Gya Prasad of Colony Rampur is a Khirak Rakshak and Secretary Gram Panchayat. So the whole issue under the circumstances boils down to this. Did Respondent No. 1 appoint the above-mentioned Kundan Lal as his polling agent and did he work as such? If so can he be considered a person working under the Government of Madhya Bharat or holding an office of profit under the Government of Madhya Bharat?

To prove this issue the petitioner has led the evidence of Kundan Lal son of Gya Prasad P.W. 6, Vishnu Patel P.W. 7 and Shri Ingale P.W. 10. Respondent No. 1 has himself come in the witness box and led evidence to this effect that as a matter of fact he appointed one Kundan Lal of Shivpuri as his polling agent for Colony Rampur who could not attend the polling station on the date when the polling took place due to his wife's ill health. His other witnesses in rebuttal are Krishna Rao, R.W. 4, Kishan Chand R.W. 8, Bapu Rao R.W. 9, Mohan Lal R.W. 10, Rameshwar Dayal R.W. 11, Kundan Lal R.W. 12 and Radha Charan R.W. 16.

Kundan Lal P.W. 6 has deposed that on 12th July 1953 he worked as a polling agent of Shri Tiwari on his bidding. He has further said that before the polling took place, he signed one form which was for the appointment of a polling agent. He has further stated that he signed the proceeding Ex. P-3 and Ex. P-4 which were recorded by Shri Ingale P.W. 10 the Presiding Officer of the Polling Station Colony Rampur. He admits in the cross examination that he did not himself read Ex. P-3 and Ex. P-4 but they were read over to him. He does not remember that date when Shri Tiwari appointed him as his polling agent. He further goes on to say that Shri Tiwari did not get his signatures on the form of his appointment but it was Bhawar Lal and he is a Hindu Maha Sabha man. First he says that he signed the form and then changes his statement and deposes that he signed a blank paper. He does not remember to have entered his parentage. Section 46 of the R.P. Act deals with the appointment of the polling agent by a duly nominated candidate *vide* rule 12 of the Representation of the People (Conduct of Elections and Election Petitions) Rules 1951. Such appointment shall be made by a letter in writing in duplicate in form 6 signed by the candidate or his election agent. Sub-rule 2 of Rule 12 requires that as soon as may be after the appointment of each polling agent of a candidate and in any case three days before the commencement of the poll, the candidate or his agent shall give notice of the appointment to the Returning Officer by forwarding to such officer, the letter of appointment referred to in sub-rule 1. Then sub-rule 3 of rule 12 enjoins that the candidate or his Election Agent shall also deliver the duplicate copy of the letter of appointment to the polling agent who shall on the date fixed for the poll present the copy to and sign the declaration contained therein before the Presiding Officer of the Polling Station where such polling agent is appointed for duty and then the

Presiding Officer has to retain it in his custody etc. So far as the fact of appointment of Kundan Lal as polling agent of Shri Tiwari is concerned, it is not proved by the evidence of Kundan Lal himself though he could have been a very important witness on this point. He never says that he did sign two forms, but on the other hand he states that he signed one blank paper. Furthermore Kundan Lal does not state that he received the duplicate letter of appointment from Shri Tiwari or his Election Agent.

Vishnu Patel P.W. 7 also corroborates this fact that the above mentioned Kundan Lal worked as his polling agent. Shri Ingale P.W. 10 has also deposed that Ex. P-3 and Ex. P-4 bear his signatures. Ex. P-3 and Ex. P-4 are the proceedings of the Polling Station Colony Rampur. He also corroborates this fact that he got the signatures of Kundan Lal on Ex. P-3 and Ex. P-4. Shri Ingale further states that he did not get any of polling agents identified as the polling agents brought their forms of appointment from the Returning Officer. It is noteworthy that Kundan Lal himself does not testify to this fact. Even from the evidence of Respondent No. 1, this fact is established that Kundan Lal son of Gya Prasad did work on the day of poll. In Ex. P-4 there is a mention of calling back of Kundan Lal agent of Hindu Maha Sabha through a Head Constable when he went outside without permission. It is marked as Ex. P-11 to Ex. P-12 in Ex. P-4 Krishna Rao R.W. 4 though denies in his examination-in-chief that Kundan Lal worked as polling agent admits this fact that Ex. P-3 and Ex. P-4 does bear the signatures of Kundan Lal. This witness was a polling agent of Shri Tiwari on this Polling Station Colony Rampur. He further admits that he did not raise any objection regarding the proceedings before the Presiding Officer nor did he tell Shri Tiwari that it was wrongly written. Babu Rao R.W. 9 a polling agent of Colony Rampur though denies this fact that Kundan Lal worked as a polling agent at least admits the fact that he was sitting with him. He further says that an identification was not done that Kundan Lal was a polling agent of Shri Tiwari. He admits his signatures under Ex. P-3 any Ex. P-4 and states that he signed last of all. From his evidence it is quite clear that Shree Ingale made a correct record of Ex. P-3 and Ex. P-4. He further admits that Ex. P-11 to Ex. P-12 contain a fact which is true. He does not deny the signatures of Kundan Lal Khirak Rakshak under Ex. P-3 and Ex. P-4. So after considering this evidence we come to the conclusion that Kundan Lal Khirak Rakshak did work on 12th July 1953 at Colony Rampur but there is no evidence of this fact on record that Shree Tiwari or his agent appointed him as his polling agent. Shri Tiwari has led evidence that he appointed one Kundan Lal of Shivpuri as his polling agent for Colony Rampur but that evidence is not at all convincing. Shri Tiwari did not mention this fact in his written statement. Moreover Shri Tiwari and Radha Charan R.W. 16 admit in their statements that there was a list prepared wherein the names of his polling agents were mentioned is not produced. No reasons have been assigned as to why it could not be produced. What evidentiary value would have been given to a list of this kind is another matter. The duplicate form of appointment of polling agent is also not produced and neither it has been said that it is lost. The way in which Shri Kundan Lal of Shivpuri states about his appointment and how he left Shivpuri and why he could not attend the polling station on the day of poll is also noteworthy of credence. After giving our careful consideration to the entire evidence on record on this issue, our conclusions are that Kundan Lal Khirak Rakshak did work on the day of poll at Colony Rampur but this fact is not proved that he was appointed as a Polling Agent either by Shri Tiwari or his agent.

Another point which we have to decide is whether Khirak Rakshak and Secretary Gram Panchayat could be said to be a person serving under the Government of Madhya Bharat or holding an Office of Profit. This important question of Law has lost its importance in view of our finding that Shri Tiwari or his agent did not appoint him as his Polling Agent, but as we have heard arguments of the learned counsel of both the sides on this point we consider it worth while to record our opinion about it.

Shri Patankar, learned counsel for the petitioner referring to Ex. P-1 and Ex. P-2 has argued before us that a Khirak Rakshak is to be appointed by the Tehsildar vide section 5 of the Madhya Bharat Cattle Trespass Act of Samvat 2007 and he has to be under the control of the Government. He has further to get the remuneration from the Government. So he is a Government Servant for all practical purposes. Shri Patankar has taken us through para. 338 and page 605 of the Constitutional Law of United States (volume No. 1) by Willoughby and has further supplemented his arguments by saying that looking to the tenure, emoluments, duration and duties of Khirak Rakshak as embodied in the Madhya Bharat Cattle Trespass Act, Khirak Rakshak is a Government Servant. Shri Inamdar, the learned counsel for respondent No. 1 has in reply brought our attention to a



Notification No. 1005/10 R.D. published in Madhya Bharat Gazette on 24th December 1952. (This is published on page 646 part 1 B—M.B. Gazette, dated 1st January 1953) and said that village Pounds are transferred to Panchayats. He has, further taken us through Sections 28, 29 and 30 of Madhya Bharat Cattle Trespass Act of 2007 (Act No. 26) and Articles 58 and 102 of Indian Constitution. According to the notification cited above, Kanji Houses were transferred to the Panchayats concerned under Section 32 of Madhya Bharat Cattle Trespass Act of Samvat 2007 before the bye-election took place therefore a person holding the office of Khirak Rakshak and Secretary Gram Panchayat cannot by any stretch of imagination be called a Government servant or a person holding an office of profit under the State of Madhya Bharat. So Kundan Lal Khirak Rakshak cannot be said to be serving under the Government of Madhya Bharat. Moreover there is nothing in the R. P. Act or in the Rules barring the appointment of Government servant as a Polling Agent. We find support for our view by a decision of the Supreme Court given in Civil Appeal No. 52 of 1954, Satya Dev Bushari *versus* Padam Dev and others. Their Lordships have said that "on the reasoning adopted in Raj Krushna Bose Vs. Binod Kanungo with reference to section 33(2), the conclusion must follow that such appointment does not *per se* contravene section 123(8). Nor is there anything in the nature of the duties of a polling agent, which necessarily brings him within the prohibition enacted in that section. The duty of a polling agent is merely to identify the voter, and that could not by itself and without more, be said to further the election prospects of the candidate. So long as the polling agent confines himself to his work as such agent of merely identifying the voters, it cannot be said that section 123(8) has, in any manner, been infringed." Hence this issue is decided against the petitioner and in favour of Respondent No. 1.

**Issue No. 3.**— The petitioner has produced P.W. 11 Pitam Singh and P.W. 12 Bhabut Singh to prove this issue. Out of these two witnesses Pitam Singh P.W. 11 has deposed that he knows Hari Shankar and he did not do anything on 19th July 1953 when the polling took place at Telli Khede Polling Station. Bhabut Singh P.W. 12 says that he saw Hari Shankar (R.W. 13) moving on the Polling Station and saying that the votes should be given for Hindu Maha Sabha and he himself was told to do the same. This witness admits that he did not vote on that day. He further says in his Cross-examination that he met Shri Tatke and other Congress workers on the polling station but did not complain about this fact to anybody. He has further said that he did not mention this particular fact to anybody. The petitioner has not come in the witness box though he happened to be there on that day. If we count out the aforesaid evidence it is not worthy of credence. Respondent No. 1 has come in the witness box and states that he did not take any help from Hari Singh for his election purposes. Hari Shankar R.W. 13 himself has denied this fact and stated that he did not work for, respondent No. 1. It is to be remembered that every influence is not corrupt within the meaning of the Election Law. Law does not take away the exercise of influence. It is only when the exercise of influence becomes undue that it becomes corrupt and avoids the Election. Under this issue not an iota of evidence has been brought on record to show that Hari Shankar Patel did work on 19th July 1953 for respondent No. 1. So this issue is decided against the petitioner.

**Issue No. 4.**—It is alleged on behalf of the petitioner that on 19th of July 1953, Prem Narain s/o Deval was working at the polling station Tili Kheda for the petitioner. Hari Shankar R.W. 13, Kripa Shankar and one Bhanwarlal attacked him with arms with a view to obstruct his work and then to assist the returned candidate. Two witnesses Krishan Murari and Prem Shankar R.W. 14 and P.W. 15 respectively are produced to prove this issue. Respondent No. 1 has neither denied his relationship with Hari Shankar and Kripa Shankar nor their presence on 19th July 1953 at Tili Kheda but he has emphatically denied about the attack with arms and that too to obstruct the work of Prem Shankar and with a view to assist respondent No. 1. Respondent No. 1 and Hari Shankar R.W. 13 have come in the witness box to deny this allegation.

Krishan Murari P.W. 14 has deposed that some ladies whom he does not recognise enquired from Prem Shankar as to where the votes were being cast. Prem Shankar showed them by pointing towards the place. On this Kripa Shankar used foul language and caught Prem Narain by throat. After this Kripa Shankar pointing towards Hari Shankar and Bhanwarlal said that "kill him with a bullet". On this Bhanwarlal attacked Prem Shankar with a "Bullam" but Prem Shankar avoided this attack. It is further said that Hari Shankar placed the gun on the chest of Prem Narain. Some people came to his rescue and ultimately this incident was closed. Prem Narain P.W. 15 also relates the same incident but what is material for us to see is, was there any direct or indirect interference or attempt to interfere on the part of a candidate or his agent or of any person with the connivance of the candidate or his agent with

the free exercise of any Electoral right? This fact has not been proved by the evidence of Krishan Murari P.W. 14 and Prem Narain P.W. 15 that Hari Shankar, Kripa Shankar and Bhanwarlal were the agents of respondent No. 1. Krishan Murari P.W. 14 admits in reply to a question that respondent No. 1 was not present at the scene of incident and moreover he was not even towards that side. Shri Tewari respondent No. 1 has deposed that he was sitting all along at the polling station and after the polling was over he heard there some scuffle and it ultimately cooled. There is no evidence to this effect that it was all done with the connivance of Shri Tewari. Krishan Murari P.W. 14 cannot say whether these ladies for whom this incident took place were voters or not or whether they at all exercised their right of vote. It is admitted that this incident took place after the ladies went away. P.W. 14 stated that some 40 voters went away, without exercising their vote and their work also suffered. This witness is not in a position to tell us even one name out of these 40 voters who went away. Not a single witness has been produced before us to this effect that he being a voter did not exercise his vote on account of that incident. Prem Narain P.W. 15 admits that he made a report of this incident to the Police but no report has been brought on record. There is no evidence to show that this incident was brought to the notice of the Presiding Officer and its failure to do so goes to show the falsity of the allegations. It has been argued before us that Hari Shankar is convicted by S.D.M. Guna for keeping arms without license, but Hari Shankar's conviction has no bearing so far this issue is concerned. The finding of the Criminal court is not binding on us and moreover if a man is convicted for keeping an arm without a licence, it does not prove undue influence as defined under section 123 R.P. Act by respondent No. 1. No Police officer has been produced to show that this incident caused a stir and fear and some of the voters went away. Some incident of the kind might have taken place but unless it is proved that it was done with the connivance of Shri Tewari or his agent and with his direct or indirect attempt to interfere with the free exercise of voters 'Electoral' right no undue influence can be considered as proved. The petitioner has not been able to prove this issue and the evidence produced by him has not a shadowy chance of its being accepted so we decide this issue accordingly.

*Issue No. 5.*—The allegation of delivering a speech by Shri Tewari respondent No. 1 as well Shri Brij Narain Brijesh on 26th of June at Bajrang Garh and threatening the Muslim voters is made by the petitioner and it is said that it amounts to an attempt to interfere with the free electoral right of the voters. This issue is sought to be proved by Barkatullah P.W. 13 and Reshabh Chandra P.W. 16. Shri Tewari respondent No. 1 has admitted the delivering of the speeches but denied that the Muslim voters were threatened. Shree Barkatullah P.W. 13 brought on record Ex. P. 6 and Ex. P. 7 which are long notes of the speeches made by Shri Tewari and Shri Brijesh respectively. Rishabh Chandra P.W. 16 has deposed that he is a correspondent of *Nai Dunia* and he was present when the above mentioned speeches were delivered. He made a note of them and it is Ex. P. 8. Ex. P. 8 does not contain any dates. This witness did not make any note of the speech delivered by Himkar Deo as it contained nothing according to him. P.W. 16 is not in a position to tell us whether there was any reporting about these speeches in the press. He is unable to tell the percentage of polling which took place at Bajrang Garh. There is no evidence to this effect that these speeches produced some effect with the result that Muslim voters were intimidated and they did not vote. It has not been placed before us that due to the speeches delivered by respondent No. 1 and 6 the percentage of Muslims voting was less. Respondent No. 1 has produced Noor Mohammad R.W. 5 in support of the contention that Muslim voters were not threatened and there were in all some 10 or 20 Muslims who heard the speeches. Considering the evidence as a whole, this issue has not been proved by the petitioner. There is no evidence as to how many voters attended the meeting and what effect it produced on the Muslim voters. It requires a good deal of credibility to accept the evidence of P. W. 13 and P.W. 16. We decide the issue against the petitioner as being not proved.

*Issue No. 6.*—This was dealt with & decided against respondent No. 1 by our order dated 26th February 1954 and the said order shall form as annexure to this judgment.

*Issue No. 7.*—This issue consists of two parts, firstly, do the pamphlets Ex. P. 9 and Ex. P. 10 contain a false statement of fact which the returned candidate believed to be false or did not believe to be true? Secondly do they pertain to the personal conduct of the petitioner or his candidature and were the pamphlets distributed by Balkrishan Panwala and if so with what effect? Ex. P. 9 and

Ex. P. 10 are the same pamphlets. Rishabh Chandra P.W. 16 and Rameshwar Prasad P.W. 17 have been produced to prove that these pamphlets were distributed by one Bal Krishan. Respondent No. 1 in his written statement admitted that the above mentioned pamphlet was printed as Ballabh Press and it was published by Mantri Hindu Maha Sabha Guna, but it is denied that it contained any false statement pertaining to personal character or conduct of the petitioner. So when the publication and distribution is admitted, we have to decide under this issue as to whether it contains any false statement of fact which the respondent No. 1 either believed to be false or did not believe to be true and does this pertain to the personal conduct or character of the petitioner? This statement as exhibited in Ex. P-9 and Ex. P-10 is that in the last election the Congress in spite of many illegal acts could secure only 14 more votes than those secured by Hindu Maha Sabha candidate. The publication of false statement is defined in section 123 clause (5) of R. P. Act. The element that must be proved in order to establish the offence now that the agency has been proved are:

- (i) There must be a statement of fact as distinguished from an expression of opinion.
- (ii) The statement must be false or believed to be false or not believed to be true.
- (iii) It must be in relation to the personal character or conduct of the petitioner as opposed to his public or political character or conduct or it must relate to the candidature or withdrawal of the candidate.
- (iv) It must be reasonably calculated to prejudice the prospects of the petitioners election.

The petitioner has not come in the witness-box. He has led no evidence to prove that the statement contained in Ex. P-9 or Ex. P-10 was false or was believed by the Respondent No. 1 to be false or was not believed by him to be true. Furthermore in order to be a corrupt practice the statement besides being false must relate to the personal character or conduct of the candidate. The statement contained in Ex. P-9 or Ex. P-10 relates to the Congress a political body and not to the personal character and conduct of the petitioner. In the circumstance of the case, we are not prepared to hold that this corrupt practice is proved by the petitioner and hence we decide this issue accordingly.

*Issue No. 8.*—Under the present law a false return of election expense is not only by itself sufficient to avoid an election but also subjects both the candidate and his agent to disqualification and consequent vacation of seat. It is a minor corrupt practice under section 124(4) R.P. Act. No evidence has been led by the petitioner to prove this issue nor any questions have been asked to Respondent No. 1 to establish that there was any falsity in material particulars in making of return of election expenses or the making of a declaration verifying any such return. So we decide this issue against the petitioner.

*Issue No. 9.*—Respondent No. 5 after filing the written statement absented himself and *ex-parte* proceedings were taken against him. He is not entitled to any costs from the petitioner. So we answer this issue in the negative.

*Issue No. 10.*—Reviewing the entire evidence on record, we are not satisfied that the petitioner has proved any of the corrupt practices alleged against Respondent No. 1 in this Election Petition and his election is not liable to be set aside in the ground alleged by the petitioner and this petition is fit to be dismissed. As regards the costs we are of opinion that had Shri Tiwari produced his list of polling agents with the forms of appointment, it would have saved the expenses and time of the Court and in addition some of the allegations though not proved are not without some justification. So we order that looking to the conduct of the parties, the costs of this petition to be borne by the parties themselves.

#### *Order of the Tribunal*

This petition is dismissed and we order the parties to bear their own costs.

(Sd.) SURAJ BHAN, *Chairman.*

(Sd.) S. K. GORHALE, *Member.*

(Sd.) S. M. PAGNIS, *Member.*

The 19th July 1954.

## ELECTION PETITION No. 21 of 1953

Sita Ram Tatke—*Petitioner.**Vs.*Vrindawan Prasad Tiwari and others—*Respondents.*

## ORDER

*Issue No. 6.*—As regards issue No. 6, we have heard Mr. Inamdar learned Counsel for Respondent No. 1 and Mr. Patankar for the petitioner at a great length. Mr. Inamdar contends before us that the allegation contained in para. No. 7(ii)(a) of the petition are indefinite and vague and thus liable to be struck off. His principal argument before us is that what has been alleged against Mr. Tiwari, and Brij Narayan Brijesh is not a statement of fact but an allegation and more over para. (ii)(e) of the petition does not contain the actual words uttered by them and it is on the other hand a purport of the words alleged to have been spoken by the speakers. He has further stressed that the statements of particulars also do not contain the actual words and furthermore it does not contain the verification that the translation in English is that of actual words spoken by them. What he means to emphasise by it is that Hindi words spoken by the speakers must have been given in the list of particulars. Mr. Inamdar has cited before us an election case reported in Doabia Election Cases (1935 to 1950) Volume II on page 150. Mohammad Zakaria Kitchlu Vs. Sh. Mohammad Sadiq.

Mr. Patankar has taken us through sections 80, 81, 83 and 123 of the R. P. Act. Mr. Patankar argues that para. 7(ii)(a) refers to undue influence and in this para. he has mentioned that prior to the polling but after the nomination of the candidates, a meeting was held. He has given the place of the meeting, the date on which it was held and the persons who made the speeches and what they said. In doing this he has complied with section 83(2) of the R. P. Act. Law does not enjoin him to give exact words uttered by the speakers or actual Hindi words spoken by them. He has further elucidated his points by referring to order 6 rule 2 of the C.P.C. and said that he has given material facts for giving complete cause of action. He has also cited before us the same ruling which is referred to above.

We have gone through, the relevant para. of the petition as well as that of the written statement. Respondent No. 1 has admitted to the place of meeting, the date and speech made by him. His main objection is that in the absence of the original words of Hindi alleged to have been spoken the allegations made against are vague and indefinite.

The object of filing particulars with the petition is to prevent the opposite party from being taken by surprise referring to section 83(2) of R.P. Act and after giving our earnest and careful consideration we are of opinion that the petitioner has sufficiently complied with the provisions of the above said sections and there was no necessity of giving the actual words used in the speeches alleged to be made in this particular case and the case cited before us supports our view. Hence this issue is decided accordingly.

(Sd.) SURAJ BHAN, *Chairman.**The 26th February, 1954.*(Sd.) S. K. GOKHALE, *Member.*(Sd.) S. M. PAGNIS, *Member.*

Election Tribunal, Gwalior.

[No. 82/21/53/13663.]

By Order,

K. S. RAJAGOPALAN,

Asst. Secy.